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IN THE

Supreme Court of the United States

October Term, 1963

No. 623

FRED S. CALHOUN, *et al.*,

Petitioners,

—v.—

A. C. LATIMER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Questions Presented

(a) Does a desegregation plan based on *Shuttlesworth* v. *Birmingham*, fairly applied, in which all criteria for transfer except proximity have subsequently been eliminated satisfy *Brown* v. *Board of Education*?

(b) The United States District Court for the Northern District of Georgia, Atlanta Division, and the United States Court of Appeals for the Fifth Circuit have held that a grade-a-year desegregation plan, effective at the date of this brief for four (4) grades, proceeds at such speed as to achieve desegregation "at the earliest practicable date." Should that decision be reversed when there has not been presented to the court below any showing of a change in circumstances since the adoption of the plan to justify an acceleration of the plan?

(c) May the United States districts courts and courts of appeal reserve questions of faculty and staff re-assignment for desegregation purposes until such time as a desegregation plan has made substantial progress in the desegregation of school children?

Statement

The history of this case has been fully outlined to this Court in the Petition for Certiorari, Brief in Opposition to the Petition for Certiorari, and briefs filed by the petitioners and by the United States. We will not, therefore, reiterate it at this time, but will comment merely upon certain significant aspects of that history.

The suit was filed in 1958 and in normal course resulted in a desegregation decree in 1959 and the submission of a desegregation plan. Because of widespread opposition to desegregation in the State of Georgia at that time there was on the statute books of the State legislation which would have required closing of the public school system of the City of Atlanta in the event of desegregation. A concerted campaign to change the sentiment in the State to permit desegregation of the Atlanta schools without disaster for public education in the City was undertaken by numerous citizens and organizations in Atlanta and environs, and in some cases outside the City. We are aware of the decision of this Court in *Cooper v. Aaron*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 19 (1958), and do not offer this public opposition as justifying defiance of the decisions of this Court, either at that time or now. We simply say that it was a fact of life with which the district judge had to deal at the time. As a result, he permited the inclusion in the desegregation plan submitted by the defendants

of a provision making the implementation of the plan contingent upon enactment of enabling legislation by the 1960 Georgia Legislature. When no such legislation was enacted, the Court withheld implementation of the desegregation decree until September, 1961. At that time desegregation was to commence no matter what consequences were to be visited upon Atlanta public education by the Georgia Legislature. To make up for the year's delay, the Court ordered that the grade-a-year plan be applied to two (2) grades in the first year of its operation.

Thus, desegregation of the Atlanta school system actually commenced in September of 1961. By that time, sufficient change in the sentiment of the people of the State had been brought about to enable the City of Atlanta to handle this difficult time in accordance with its traditional spirit of tolerance and moderation. While this Court has pointed out in *Watson v. Board of Education of the City of Memphis*, 373 U. S. 526, 10 L. Ed. 2d 529, 83 S. Ct. 1314 (1963), that a considerable period of time has elapsed since *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), it is nevertheless true that the Atlanta plan has been in operation only since 1961. This late start is not attributable to any actions of the respondents or any other officials of the City of Atlanta. We do not claim that this fact provides the City with a cloak of protection for unconstitutional action nor that it justifies delays not otherwise warranted. Per contra, the delays that have occurred did not result from recalcitrance or bad faith of these respondents and do not justify imputations of any such conduct to them. Insofar as the comments of Mr. Justice Goldberg, in *Watson*, are based

upon inferences of this nature, they would not be applicable here. The progress under the Atlanta plan has, in fact, been quite remarkable and it is proceeding at an accelerating pace.

The desegregation plan originally submitted by the respondents was modelled upon the Birmingham plan approved in *Shuttlesworth v. Birmingham Board of Education*, 358 U.S. 101, 3 L. Ed. 2d 145, 79 S. Ct. 221 (1958), affirming 162 F. Supp. 372. The plan originally involved the use of some eighteen (18) criteria to be applied in the consideration of applications for transfer from one school to another. An essential feature of the plan was that it was a transfer plan; that is, it involved an acceptance of school assignments as they then existed as a base, with desegregation to be accomplished by transfers on application. With respect to children entering high school, this feature of the plan is scheduled for discard by the respondents as a result of the opinion of Judge Bell below. Petitioners themselves have pointed out that the use of a transfer system to effect desegregation continues in use in the Fourth Circuit, provided only that transfers be freely given.[1]

It would seem to us that such a transfer system is constitutionally valid if this Court is not to repudiate *Shuttlesworth*. Moreover, this Court pointed out only last year in *Goss* v. *Board of Education of the City of Knoxville*, 373 U.S. 683, 10 L. Ed. 2d 632, 83 S. Ct. 1405 (1963):

> ". . . we note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition

[1] See footnote 9 on page 11 of the Brief for Petitioners.

> of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or transfer to another."

The desegregation plan as filed and accepted by the District Court included numerous factors designed to assure that any person transferred from a segregated to a desegregated school would be able to achieve success in his new environment. To this end, personality interviews and special tests were used in evaluating applications for transfer. In the Court below Judge Bell pointed out (see footnote 2. in his opinion) that "such solicitude has rightly been condemned where applied only to Negroes." He also pointed out that "it would appear, where done in good faith, and there is no contrary contention here, to lend itself, at least in the early days of transition, to assuring the success of a plan." In the first year of desegregation the result of this caution by the respondents was that only ten (10) transfers were granted.

In the second year of the operation of the plan certain of the tests and interviews were abandoned by the respondents, without compulsion of court order, and a larger number of transfer applications were granted. It had been ascertained that special personality and intelligence tests served no useful educational purpose, and they were discarded.

By fall of 1963, the respondents felt that the solicitude above-mentioned was no longer necessary. At that time there were on file a good many applications for transfer that had been previously rejected. Each applicant was summoned by school officials and asked if

he still wished to have his application considered. If the applicant replied that he did, the request for transfer was granted upon one condition. That condition was that the applicant reside nearer the school to which he sought transfer than to the school he was then attending. *Every applicant who met this condition had his application granted.*[2]

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[2]The conferences at which this occurred were reported in a letter from a school official to one of counsel for respondents:

Atlanta Public Schools
Administration Building
224 Central Avenue, S.W.
Atlanta 3, Georgia

Administrative Offices

December 6, 1963

Mr. A. C. Latimer
1203 Healey Building
Atlanta, Georgia

Dear Mr. Latimer:

In response to your request for further information I am supplying answers to specific questions as follows:

1. Upon what basis and authorization were Negro transfers allowed in 1963?
   In June, 86 Negro pupils were authorized transfer on the basis of probability of succeeding academically and upon their proximity to the school requested. However, in August, 1963, the factor or criterion of "probability of academic success" was removed and all students desiring to continue their application were transferred provided they lived closer to the predominantly white school requested. This new position was approved by the Board of Education on August 20, upon the recommendation of the Superintendent.
2. What were some comparisons in terms of number of transfers requested, number of transfers approved, and percentage of transfers approved in 1961, 1962, and 1963?

	1961	*1962*	*1963*
Number returning applications	135	263	191
Number authorized to transfer	10	40	119
Percentage	07%	15%	62%

3. Of the number applying for transfer in 1961, 1962, and 1963, how many were denied admission who, in fact, lived closer to the white schools requested than to the Negro schools in which they were currently enrolled?

Scheduled for the fall of 1964 is the next step, ordered

	1961	*1962*	*1963*
Number applying	135	263	191
Number approved	10	40	119
Lived closer to present school	90	72	29
Lived closer to "white" school	35	151	43
Number denied living closer to "white" school	25	111	0*

*None denied who wished their application continued.

4. Are there instances or examples in which the Atlanta school system liberalized the Pupil Placement Plan or exceeded the tempo of desegregation prescribed by the plan, or otherwise demonstrated good faith in going beyond the minimum limits of the placement plan, in desegregation of the schools?

(a) At the outset only 3 of the 18 criteria were used because only 3 appeared to be practical and meaningful. In 1962, the only factors judged were "probability of academic success" and "proximity to the schools requested." In 1963, no factor was used except that of "proximity to the school requested."

(b) Students moving into the city requesting transfers to white schools on dates other than that specified by the pupil placement plan were allowed to enroll in predominantly white schools. (Example: Paula Sherwood moved here from New York and requested to enter West Fulton and the request was granted.)

White students requesting transfer to Negro schools were approved. (Example: Charles Jerome Coleman to Washington.)

(c) Occasionally students are allowed to accelerate from the 7th to the 9th grade when these students are exceptionally brilliant. (Example: Michael Fears, a Negro student, was allowed to skip the 8th and move directly from the 7th to the 9th grade at predominantly white Fulton High School.)

(d) About 14 students were enrolled at Smith-Hughes, previously all white, last February without having to file application as prescribed in the Pupil Placement Plan.

(e) In the fall of 1963 all Negro applicants, qualifying for admission on the same basis as white, were admitted to Smith-Hughes Vocational School. The number enrolling is 334 adult students.

I hope this information is what you requested.

Sincerely yours,

RUAL W. STEPHENS
Deputy Superintendent

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by the Circuit Court. At that time the transfer feature of the desegregation plan begins to vanish as elementary students move into the high schools nearest their homes without application. Of course there will remain a transfer provision authorizing applications for transfer on non-racial grounds. When the plan has reached the first grade it is to be assumed that initial assignments to the first grade will be made on a similarly acceptable basis. In the meantime it will also have passed from the higher grades.

Most cities that have adopted desegregation plans have provided for commencing with the first grade or kindergarten and working upward. The Atlanta plan started with the twelfth grade and is working its way down. There does not appear to be universal agreement as to which of these plans is better. While the first grade up method may minimize racial prejudice by accustoming children to a desegregated situation in their earliest years, the top down system has the effect of assuring that all school children in the system when the plan goes into effect shall have an opportunity for desegregated education during their years in school. That is, if the Atlanta plan remains in force in its present form, applying from the eighth through the twelfth grades in the fall of 1964, children now in the seventh grade will have five years of desegregated education, children now in the sixth grade will have six years of desegregated education, and so on. In this way there is not the possibility that a child will move along just ahead of desegregation as he might in a bottom up desegregation plan.[3]

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[3]The same point is made in Knowles, *School Desegregation*, 42 No. Car. L. Rev. 67, 72, n. 27. "If a grade-a-year plan started at

Other advantages of the Atlanta type desegregation plan were derived from the more extended extra-curricular activities available in upper grades. As Judge Bell pointed out below:

> "Negro students assigned to previously all white schools participated in both regular and extra-curricular activities, including honor banquets, clubs and other activities on the basis of free choice, and their parents attended Parent-Teacher Association meetings, athletic events, graduation programs and other school activities free of racial discrimination. School events to which the public is invited are not segregated, nor are meetings of professional committees." (R 234)

Thus there are important advantages to be derived from a top down desegregation plan. The brief of the United States pointed out that there are disadvantages, too. We realize that that is true, but no implication that all the advantages are on one side is justified.

The District Court, in the exercise of its discretion, chose to postpone the consideration of faculty desegregation until further progress had been made in desegregation of students. (R 157). Nevertheless, there has occurred some desegregation of faculty activities on the initiative of the respondents. (R 73).

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grade twelve and worked down, it would allow every Negro child in the system an opportunity, albeit limited, for some desegregated education. On the other hand, if a grade-a-year plan started with the first grade, no Negro child in grades two through twelve would ever experience a desegregated education."

ARGUMENT

1. *The Plan Will Achieve Complete Desegregation.*

We understand the effect of the *Brown* decision to be as follows: After the transition period has ended, every child attending public schools in any city in the United States shall be assigned to school on the same basis as every other child in that city, without regard to race. If neighborhood housing patterns are such that the result is that many schools are attended predominantly by one race rather than another, this is a constitutionally permissible result.

The brief of the United States (p. 36) makes much of the fact that only some 150 Negro students are presently attending formerly all-white schools, and states: "Plainly that is no accident of geography." Implicit in that sentence is the assumption that if it were an accident of geography it would be permissible.

At least in large part it *is* an accident of geography. The District Court, which sits in Atlanta and knows the facts, found that:

> "The above result, [a small number of Negroes in formerly all-white schools] however, where it pertains, is not necessarily brought about on account of racial discrimination, but on account of geography and residential patterns."[4]

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[4]R. 20. Further, the District Court and counsel for petitioners engaged in the following colloquy:

"Mrs. Motley: I think the nearness to the school is a pertinent consideration but I don't see that in this plan.

The Court: Well, there's nothing in there to negative that. Now would I not be compelled to take judicial cognizance of the fact that in Atlanta the—residentially speaking there are vast

In the light of this finding it is apparent that numerical comparisons like the one contained in the brief of the United States are actually meaningless and do not, standing alone, justify any inferences. The argument is glib, but it is not relevant.

Based on such numerical calculations which in turn are based on geography and upon the fact that the Atlanta plan has not come to full fruition, opposing counsel gratuitously assume that such plan will not result in complete desegregation; and worse, that it was not designed to do so in the first place.

To this we must respond.

As previously stated the Atlanta plan is based almost verbatim upon the Alabama plan considered in *Shuttlesworth v. Birmingham Board of Education*, 162 F.Supp. 372. It is significant, we think, that this is the only comprehensive plan of school desegregation which has ever been considered and held constitutional by this Court either "on its face" or otherwise. 358 U.S. 101.

Two Courts have held that the Atlanta plan is being fairly administered. Indeed, while the Motion for Further

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white areas and colored areas and that in those areas the students are predominantly white and colored? That's a fact, isn't it?
Mrs. Motley: Yes, sir.
The Court: Well then would it not follow if you say that they shall stay in the schools in which they now are for the great part, you would still have primarily white in some and colored in others, isn't that true?
Mrs. Motley: Yes, if the children are assigned on the basis of nearness to schools, you would still have many schools which are primarily white and which are primarily Negro.
The Court: Now in spite of all that you say that they should not be left prima facie where they are and then pertinent changes made. I don't quite understand that.
Mrs. Motley: No, the objection which I have relates to the designation of certain schools as Negro and white...." (R 212).

Relief that gave rise, ultimately, to the Writ of Certiorari purported to challenge the administration of the plan, its real thrust was an attack upon the plan as a whole and on its face. It must have been the thought of petitioners that *Shuttlesworth* precluded an undisguised attack upon the plan as a whole. Even so, that is what the Motion for Further Relief was.

This fact is apparent from a consideration of the proceedings below, and the nature of the further relief sought. Though it was said that the attack was aimed at discriminatory application of the plan, no effort was made by petitioners to show even one instance in support of the charge. Petitioners asserted that they need not take cases of discrimination individually, and it may be that they are right. On the other hand, if the attack were on the application of the plan, surely it would have been necessary to make such an attack by means other than mere asseveration. Surely it would have been necessary to show at least one instance, if not to show enough to make a pattern.

Further, the petitioners' motion asked for faculty desegregation, not in the original plan, a timetable different from that in the plan, and a method of reassignment of pupils not only not contemplated by the plan but explicitly rejected by the trial court. Moreover, petitioners attack, in this Court, the eighteen criteria for transfer that once were part of the plan but that were abandoned, along with the administrative machinery. It is clear then, is it not, that the actual thrust of petitioners' motion was an attack on the plan as a whole, even though they had formerly approved it and moved its adoption.

Even though the usual notions of finality [*Brown*

Shoe Company v. United States, 370 U.S.294, 8 L.Ed.2d 510, 82 S.Ct.1502 (1962)] which would seem to preclude an attack by petitioners on the plan as a whole in view of their motion to adopt the plan (R. 38), and in view of their dismissal of their appeal (R. 173), may not be binding on these petitioners, still the history of the case shows that no bona fide attack is made upon the *administration* of the plan. And even if it were, two federal courts have ruled that administration has been fair and in good faith.

Thus, the actual question before the Court is simply this: Must *Shuttlesworth* be overruled? Or rather, that would be the question if Atlanta had not so substantially improved upon *Shuttlesworth*, along the lines suggested by *Goss*.

The alleged deficiencies of the plan, we submit, vanish if the plan is fairly considered from the standpoint of deliberateness as well as speed.

The basic assault on the plan by petitioners, for example, is that it does not contain any provision for "initial reassignment" of pupils but instead "freezes" petitioners into an existing segregated system of assignments and places on them a burden, not shared by white students, of getting out by transfer.

In the first place this precise argument was made in *Shuttlesworth* to no avail. See 162 F.Supp.at 375, note 3(V)(3).

In the second place, if deliberation as well as speed is taken into account the plan does no such thing. More correctly, what it does is "freeze" reassignments, (subject to freely granted applications for transfer) for a

limited period of time, thus avoiding the necessity of a chaotic reassignment of every student in every school at one time. This, plus the grade-a-year provision, constitute the only elements of deliberation which the plan contains; elements which petitioners would sacrifice entirely on the altar of speed.

That these provisions are merely transitory is well illustrated by the posture of desegregation in Atlanta at the present time. Progressing downward a grade a year, the Atlanta plan has now reached the eighth grade; that is, the first year of high school. (The system of junior high schools is not employed.) Admittedly, in the three years it has been in operation students in the affected grades had to apply for transfers or be "frozen" in. The fact that those who did apply were fairly treated is, for the moment, beside the point. But consider what will happen under the plan in 1964 and all succeeding years. As every student then and thereafter finishes the seventh grade he will and must receive an "initial" assignment to a high school without regard to race. At that point and thereafter the "freezing in" of existing assignments is over; although, of course, there will still be transfers for legitimate reasons not related to race.

In due course the plan will reach the first grade and initial assignments there will be made on the same basis. At this point, despite the protestations of petitioners, desegregation will be complete within the meaning of *Brown*.

In its brief the United States makes several suggestions which it refers to as "obvious solutions." It suggests, as such, an immediate reassignment of all students on the basis of proximity alone. Admittedly Atlanta has

recently resorted to proximity as a factor in making transfers;[5] but for administrative reasons Atlanta has never used either inflexible zones or proximity as the sole criterion either at the first grade or the high school level. It does not want to resort solely to inflexible zones or proximity now; and if faced with a choice would probably prefer a system of complete freedom of choice[6] conditioned only upon availability of facilities, with resort to proximity to settle priorities between two applicants where facilities were available for only one. Such a choice, obviously, bears no relation to integration or segregation and would be consistent with either.

But these suggestions are beside the point. Atlanta has an "obvious solution." Once it becomes clear that as the present plan progresses there will be initial assignments, without regard to race — in short, once it appears that the freeze-in of existing assignments is purely transitory — petitioners' argument that the Atlanta plan is inherently unfair is eliminated.

2. *No Case Has Been Made for Acceleration of the Atlanta Plan.*

This Court held in *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), and again in *Cooper* v. *Aaron*, supra, that the precise speed for the accomplishment of desegregation was a matter within the discretion of the lower federal courts. Emphasis was placed in those cases upon the extreme variations existing between different cities with

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[5]See note 2, p. 7, supra.

[6]Dr. Letson testified: "In fact, pupils—pupils from all over the city attend schools all over the city." (R. 99).

regard to administrative and other problems involved in a transition from segregated to desegregated schools.

Two recent decisions of this Court have cast doubt upon the continuing validity of these previous rulings. As pointed out by petitioners and by the United States, this Court remarked in *Watson* v. *City of Memphis*, supra, and in *Goss* v. *Board of Education of City of Knoxville*, 373 U.S. 683, 10 L. Ed. 2d 632, 83 S. Ct. 1405 (1963), upon the passage of time since the *Brown* cases. The language taken out of context has been pressed into service for the purpose of reversing the carefully considered decision in the second *Brown* case that while the rights of the petitioners are present rights, nevertheless, a degree of gradualism in implementing desegregation is sometimes necessary.

It is true that some lower courts have ordered speed-ups in desegregation plans proffered to them for approval. On the other hand, in the spirit of the second *Brown* case and *Cooper* v. *Aaron*, supra, this Court has never even considered such a question. The opportunity to do so has been presented on more than one occasion. One of the issues in the lower court in *Cooper* v. *Aaron* itself related to the alleged fact that desegregation was proceeding too slowly. However, this Court, even though a full dress opinion was written, had nothing to say on the matter of speed except to reiterate the earlier position that it was a question peculiarly the concern of the lower federal courts.[7] Again, *Kelley* v. *Board of Education of City of Nashville*, 270 F. 2d 209 (C.A. 6th, 1959), presented this Court with an opportunity to take away from the lower federal courts discretion over the

[7]Each of the lower courts in this case has passed upon the speed of the Atlanta plan and found it satisfactory. (R. 159, 243).

question of speed of desegregation. The principal issue in the case was whether a twelve-year desegregation plan was too deliberate. The Court of Appeals for the Sixth Circuit ruled that this was a question for the discretion of the trial judge. This Court denied certiorari, 361 U.S. 924, with the Chief Justice and Justices Douglas and Brennan of the opinion that the writ should be granted. They, however, wished to review another issue in the case. No member felt that this Court should take over the discretionary function of establishing the exact amount of permissible time for each city affected by the *Brown* cases.

Both petitioners and the United States as amicus curiae have pointed out that there are cases in which the district courts or courts of appeals have required speed-ups in desegregation plans. The United States Court of Appeals for the Fifth Circuit did so in *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (C.A. 5th, 1962). The Fifth Circuit has also urged haste in several cases, including *Boson* v. *Rippy*, 285 F. 2d 43 (C.A. 5th, 1960), and *Davis* v. *Board of School Commissioners of Mobile County, Alabama*, 318 F. 2d 63 (C.A. 5th, 1963). The Fifth Circuit is therefore fully cognizant of the fact that this Court's requirement of all deliberate speed in the desegregation process includes emphasis upon speed as well as upon deliberateness.

This Court emphasized in *Cooper* v. *Aaron*, supra, that desegregation would be a process requiring different periods of time from one city to another and that this element of time was contingent upon many varying factors, including size of school systems, problems of crowding and shifting populations, and many other factors

more within the cognizance of the district courts and courts of appeals than of this Court.[8]

There would not seem to be occasion in this case for the Court to repudiate its holding in *Cooper* v. *Aaron* that the transition to desegregation should be supervised by the lower federal courts exercising the flexibility traditional to equity courts.

In the *Mobile County* case in 1963, the Fifth Circuit remarked sharply upon the fact that "the amount of time available for the transition from segregated to desegregated schools becomes more sharply limited with the passage of the years since the first and second *Brown* decisions." (318 F. 2d at 64). On the same day the same Court prescribed a twelve-year plan in *Stell* v. *Savannah-Chatham County Board of Education*, 318

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[8]The opinion of the District Court upon the petitioners' Motion for Further Relief in 1960, stated:

"(2) Throughout this litigation the Court has held to the opinion that delay in ordering the entire elimination of segregation in the Atlanta Public Schools could be justified only in the event that bona fide efforts were being made to eliminate the same under a reasonable and gradual Plan. If no good faith efforts were to be made to that end nothing could be accomplished by delay." (R. 49).

The order of the District Court on petitioners' Motion for Further Relief in 1962 stated:

"When this Court approved the Plan on January 20, 1960 many local conditions mitigating against a more speedy transition were considered (see 188 F.S. 401), these factors included the following:

There were in Atlanta 116,000 pupils, of which approximately forty per cent, or some 46,400, were Negroes. There was a rapid influx of children of school age into the city and a shortage of some 580 class rooms, many classes then being held in Churches and other buildings, and many having double sessions. Other problems confronted the School Board, caused by slum clearances and changes in residential patterns, to which may now be added complications arising out of large tracts of land being condemned for expressways." (R. 159)

F. 2d 425 (C.A. 5th, 1963). (R. 242). Thus, there are still being adopted twelve-year plans beginning four years after Atlanta.

If this Court is not to reverse its previous decisions and declare that desegregation must take place immediately in all places, then it would seem to us that it can scarcely undertake the task of making the delicate determination as to the precise speed of desegregation in every city, town and hamlet in the nation. In the nature of things, this Court cannot bring before it all the necessary information to make such decisions. It was in recognition of this fact that this Court in *Brown*, and again in *Cooper* v. *Aaron* explicitly delegated these questions to the lower federal courts. Also in recognition of this fact, this Court has steadily refused to consider such questions. Of course, this Court has the right and duty to supervise the lower federal courts in the exercise of their discretion. In this connection the Court pointed out in *Brown* and *Cooper* that the lower federal courts should exercise a continuing supervision over school officials so as to assure themselves that the school officials were acting in good faith to the end of accomplishing desegregation as expeditiously as possible. Good faith has been made the litmus paper for the transition to desegregation.

The two lower federal courts have explicitly held that the respondents are proceeding in good faith to carry out the desegregation plan submitted by them and approved by the District Court. The District Court stated as follows:

> "The Plan heretofore approved by this Court, and now under attack, has been administered fairly

> and in good faith by defendant Atlanta Board of Education, the local authorities have given utmost cooperation in maintaining law and order, and the number of students being transferred . . . from previously designated colored schools to previously designated white schools is increasing at an accelerated rate each year as the lower grades are reached. This Court feels that the public interests demand that the Plan now in operation be continued according to its terms and not be summarily displaced by the new Plan of Desegregation proposed by plaintiffs." *Calhoun* v. *Latimer*, 217 F. Supp. 614, 7 Race Rel. L. Rep. 1054 (N.D. Ga., 1962). (R. 156, 159).

The Circuit Court (Judge Bell and Judge Lewis of the Ninth Circuit) concurred in this finding of good faith and emphasized the progress taking place in the Atlanta school system:

> "*In the meantime the Atlanta plan is working.* Progress is the test, and the necessary transition is taking place. There has been no trouble. All responsible officials and many private citizens have cooperated to make it work, and to preserve public education." (R. 245) (Emphasis supplied).

At the same time, Judge Bell made it clear that the Fifth Circuit would not be reluctant to carry out the duties delegated to it regarding supervision of the transition to desegregation:

> "We do wish, however, to point out some fundamentals to be borne in mind in the future handling of this and like matters where an approved plan is in operation. Whether to effect a plan, to speed it up, or to otherwise modify it is in the first instance for the school board. This is likewise true as to problems arising in connection with the administration of a plan. The courts are ill equipped to run the schools. Litigants must not ignore school offi-

> cials, and school officials must not abdicate their function to the courts. They, like the courts, are bound by the Constitution as interpreted by the Supreme Court, *Cooper* v. *Aaron*, supra. With these principles in mind, this record discloses no problem that could not be resolved between appellants and the school officials based on the judgment of the school officials as educators, with the application of wisdom, forebearance and mutual trust to the educational purpose of schools." (R. 245).

It is quite clear that the Fifth Circuit has not been and will not be derelict in its duty in this regard and needs no instruction from this Court. It is pointed out by the petitioners that the Fifth Circuit has, when it considered it appropriate under the circumstances, required acceleration of desegregation plans. In *Davis* v. *Board of School Commissioners of Mobile County*, supra, the Fifth Circuit instructed the District Court to be about the business of desegregation and made it clear that if he continued to show himself reluctant, his discretion would be displaced by the Fifth Circuit.

In another instance, the Court of Appeals for the Fifth Circuit anticipated the ruling by this Court in *Goss* that transfers could not be granted to white children for the purpose of escaping a desegregated school. *Stone* v. *Members of the Board of Education of Atlanta*, 309 F. 2d 638 (C.A. 5th, 1962).

While the good faith of the respondents has been noted by both the lower courts, including the dissenting judge in the Fifth Circuit, we would point out that those remarks were based upon a record including the earlier stages of the operation of the desegregation plan. Since that time, the respondents have voluntarily dispensed

with all criteria of the desegregation plan that could have about them even the suspicion that it was intended to use them for purposes of avoiding desegregation. As a result, in September of 1963, the plan, though it remained a transfer plan, was based upon the one simple criterion of proximity of residence to school. Scheduled for discard in 1964 is the entire machinery of the original plan relating to the filing and processing of formal applications for transfer, including time and necessity of filing, the use of tests, and the necessity of pursuing the administrative remedies prescribed in the plan.

Curiously enough, the very good faith of the respondents is now urged against them. It is said that, since Atlanta is handling the transition to desegregation in such a satisfactory way, it should be compelled to scrap the plan in operation and adopt a different one. There seems to be implicit in this, albeit turned on its head, the argument repudiated by this Court in *Cooper* v. *Aaron*, that disagreement or violent opposition to desegregation was a factor that could stay the implementation of the *Brown* decision. That is to say, petitioners urge that since Atlanta is accepting the transition to desegregation peacefully and satisfactorily, the process should be speeded up. But *Cooper* v. *Aaron* made clear that desegregation could not be slowed down by violent opposition, and that seems to be merely another way of saying that it need not be speeded up because of peaceful acceptance.

The pace of desegregation was not dictated by considerations of the sort just mentioned. Grade-a-year desegregation was dictated by the size of the school system and the attendant administrative problems. In this con-

nection we would ask the Court to compare *Evans* v. *Ennis*, 281 F. 2d 385 (C.A. 3d, 1960). In that case it was held that a twelve-year desegregation plan was too slow for the State of Delaware but it was pointed out that there were, in the entire state, only some 7,000 Negro students and, calculating from the percentage of Negro students who had opted to go to white schools, the Court concluded that the number of transfers or reassignments to be accommodated amounted to something less than 200 school children. In reaching its decision the Court distinguished *Kelley* v. *Board of Education of City of Nashville*, supra, on the basis of the size of the school system affected and particularly the ratio of Negro to white children. It was made very explicit, then, by the Third Circuit, that the size of the school system was a dominant consideration in the determination of the appropriate speed for desegregation.

The District Court and the Court of Appeals in this case have, in their discretion, determined that a twelve-year pace is an appropriate one for Atlanta. As we have seen, in so exercising their discretion, the lower courts were not motivated by any reluctance to achieve desegregation, but acted with the principles enunciated by this Court in the *Brown* decisions, *Cooper* v. *Aaron*, *Watson*, and *Goss* in the forefront of their minds.

Only one thing has happened to suggest an acceleration of the plan. That is the degree of acceptance of desegregation that has been shown by Atlantans and school officials. *Cooper* made clear that this is an irrelevancy.

3. *It Was a Proper Exercise of Discretion to Delay Consideration of Faculty and Staff Re-assignments.*

Brown v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), held that a policy of systematic segregation of school children was unconstitutional; no explicit decision was made regarding assignment of teachers, or other school personnel. It was based upon the purported fact that separate schools are inherently unequal and that segregation in itself tends to have a psychological impact upon children in the minority group that is detrimental to their ability to learn. This decision was supported by the writings and findings of psychologists and sociologists, and the Court seemed to be stating what it considered to be true, as a matter of fact. No finding of fact has been made in this case or, so far as we are aware, any other, and no evidence was presented in this case, to support an allegation that any given method of assigning teachers, much less other school officials, has any known psychological impact upon the students. Therefore, it does not seem to us that *Brown* requires any action with regard to teacher assignment.

However, should *Brown* require such, we believe that the decision of the District Court postponing consideration of this problem was justified. For several reasons, teacher assignment is a different problem from pupil assignment.

In the first place, teachers cannot simply be reassigned against their wishes, as pupils can, since teachers have the option to leave the school system, as pupils cannot. Teachers seek employment in the school system only if

that employment is attractive to them in various respects. The City of Atlanta is twenty miles, or so, across, and teachers, as much as any other persons, want their employment reasonably close to home. If we were to shuffle teacher assignments, we should surely lose a substantial part of our staff. It seems to us that the only system that can work for teacher assignment is a system of free choice, as we now have.

It also appears to us that a quota system for teachers would be contrary to the spirit of the equal protection clause. If the thrust of the *Brown* decision really is that a school with an 80% white enrollment and a 20% Negro enrollment must have 80% white teachers and 20% Negro teachers, then the constitutional rights of teachers, and indeed the spirit of the Constitution itself, are surely sacrificed to the constitutional rights of the children to a desegregated education.

We cannot believe that *Brown* requires such a result. We also believe that this is an unreal issue before this Court. If, after desegregation of the school system is accomplished, there should be a given school with 80% white enrollment and 20% Negro enrollment, this will presumably be because the neighborhood served by the school has that racial composition. It would likely be that among the Negroes there would be teachers desiring assignment to that particular school. There would be no reason for the respondents to deny them such an assignment and it would be done. That is a far cry, however, from what is urged upon this Court by the petitioners, who seem to contemplate a reshuffling of the school teachers against their wills under Court order at this time.

For these reasons the District Court and the Court of Appeals thought that it was appropriate that they delay consideration of the problem of teacher assignment. We believe this was a proper exercise of their discretion.

CONCLUSION

Much of the formal record in this case is ancient history. This Court has said that district courts must supervise the progress of desegregation. There can be no perception of this movement if the seventeen criteria once part of the plan are viewed as though they were still present. Here is the progress:

In 1961 there were seventeen criteria used to test the application of a Negro to transfer to a white school. There were included special achievement and personality tests. All but about three of the criteria proved useless and were discarded even in the first year.

In 1962 the special tests were voluntarily dropped.

In 1963 all criteria except proximity of residence to school were dropped, but applications for transfer were still necessary.

In September, 1964 the feeder system takes hold. Then even applications for transfer are no longer necessary for the eighth grade and initial assignments to high schools will be based upon geography alone.

As previously explained, the administrative machinery for screening applications for transfer has been scrapped, since the transfers are routinely granted.

This progress is not looked upon with favor by the petitioners and yet only five years ago Atlanta citizens'

groups were desperately trying to avoid the loss of public education, and three years ago the City made its first steps toward desegregation a source of pride to the entire country. We led the way that other cities in the south have followed. A page of history is worth a volume of logic; part of Atlanta's history includes this commendation from the late President of the United States:

August 31, 1961
Atlanta Constitution

"Kennedy's
Praise for
Atlantans

Constitution Washington Bureau

Here is the text of President John F. Kennedy's comment during his press conference Wednesday relating to the integration of Atlanta's schools:

"I have several announcements to make.

"First, I want to take this opportunity to congratulate Governor Vandiver, Mayor Hartsfield of Atlanta, Chief of Police Jenkins, Superintendent of Schools Letson and all of the parents, students and citizens of Atlanta, Georgia, for the responsible, law abiding manner in which four high schools were desegregated today.

"This was the result of vigorous efforts for months by the officials of Atlanta and by groups of citizens throughout the community.

"Their efforts have borne fruit in the orderly manner in which the desegregation was carried out with dignity and without incident," Kennedy continued.

"Too often in the past such steps have been marred by violence and disrespect for law.

> "I strongly urge the officials and citizens of all communities which face this difficult transition in the coming weeks and months to look closely at what Atlanta has done and to meet their responsibility, as the officials of Atlanta and Georgia have done, with courage, tolerance and, above all, with respect for the law."

In the two and one-half years since that press conference a revolution in public education has been effected here. Two Courts have approved the progress made and have noted the accelerating pace imparted to it. Against that background petitioners say that we must scrap it all after less than three years. Surely there is no occasion for such a decision.

We respectfully submit that the decision of the court below should be affirmed.

Respectfully submitted,

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